

Feb 09, 2018

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TAMMY BLANCHARD,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No.1:17-CV-03057-JTR

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF Nos. 14, 15. Attorney D. James Tree represents Tammy Blanchard (Plaintiff); Special Assistant United States Attorney Danielle R. Mroczek represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 3. After reviewing the administrative record and briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

JURISDICTION

Plaintiff filed applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) on November 30, 2012, Tr. 231, alleging disability since February 18, 2011, Tr. 204-11, due to tumors in her uterus, hernia, depression, and anxiety, Tr. 234. The applications were denied initially and upon

1 reconsideration. Tr. 118-32, 135-45. Administrative Law Judge (ALJ) Virginia M.
2 Robinson held a hearing on February 25, 2015 and heard testimony from Plaintiff
3 and vocational expert, Trevor Duncan. Tr. 37-67. The ALJ issued an unfavorable
4 decision on August 13, 2015. Tr. 19-30. The Appeals Council denied review on
5 January 24, 2017. Tr. 1-6. The ALJ's August 13, 2015 decision became the final
6 decision of the Commissioner, which is appealable to the district court pursuant to
7 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on March 28,
8 2017. ECF Nos. 1, 5.

9 **STATEMENT OF FACTS**

10 The facts of the case are set forth in the administrative hearing transcript, the
11 ALJ's decision, and the briefs of the parties. They are only briefly summarized
12 here.

13 Plaintiff was 48 years old at the alleged date of onset. Tr. 204. Her highest
14 level of education was the ninth grade, completed in 1978. Tr. 235. Her reported
15 work history includes the jobs of cook, housekeeper, packer, router, and shift
16 manager at a fast food restaurant. Tr. 236. Plaintiff reported that she stopped
17 working on January 10, 2010 due to her conditions, stating that she "was
18 experiencing depression and unexplained physical pain." Tr. 234

19 **STANDARD OF REVIEW**

20 The ALJ is responsible for determining credibility, resolving conflicts in
21 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
22 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
23 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
24 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
25 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
26 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
27 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
28 another way, substantial evidence is such relevant evidence as a reasonable mind

1 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
2 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
3 interpretation, the court may not substitute its judgment for that of the ALJ.
4 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative
5 findings, or if conflicting evidence supports a finding of either disability or non-
6 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d
7 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial
8 evidence will be set aside if the proper legal standards were not applied in
9 weighing the evidence and making the decision. *Browner v. Secretary of Health*
10 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

11 **SEQUENTIAL EVALUATION PROCESS**

12 The Commissioner has established a five-step sequential evaluation process
13 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
14 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one
15 through four, the burden of proof rests upon the claimant to establish a prima facie
16 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This
17 burden is met once the claimant establishes that physical or mental impairments
18 prevent her from engaging in her previous occupations. 20 C.F.R. §§
19 404.1520(a)(4), 416.920(a)(4). If the claimant cannot do her past relevant work,
20 the ALJ proceeds to step five, and the burden shifts to the Commissioner to show
21 that (1) the claimant can make an adjustment to other work, and (2) specific jobs
22 exist in the national economy which the claimant can perform. *Batson v. Comm'r*
23 *of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94 (9th Cir. 2004). If the claimant
24 cannot make an adjustment to other work in the national economy, a finding of
25 "disabled" is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

26 **ADMINISTRATIVE DECISION**

27 On August 13, 2015, the ALJ issued a decision finding Plaintiff was not
28 disabled as defined in the Social Security Act.

1 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
2 activity since February 18, 2011, the alleged date of onset. Tr. 21.

3 At step two, the ALJ determined Plaintiff had the following severe
4 impairments: degenerative disk disease; affective disorder; and personality
5 disorder. Tr. 21.

6 At step three, the ALJ found Plaintiff did not have an impairment or
7 combination of impairments that met or medically equaled the severity of one of
8 the listed impairments. Tr. 22.

9 At step four, the ALJ assessed Plaintiff's residual function capacity and
10 determined she could perform a full range of work at a light exertional level with
11 the following limitations:

12 lift/carry up to 20 pounds occasionally, 10 pounds frequently; stand or
13 walk for approximately six hours and six for approximately six hours
14 per eight hour work day with normal breaks; occasionally climb ramps
15 or stairs; never climb ladders, ropes, or scaffolds; occasionally stoop,
16 kneel, and crouch; never crawl; no overhead reaching with the right
17 upper extremity, but otherwise unlimited; avoid concentrated exposure
18 to excessive vibration and workplace hazards such as working with
19 dangerous machinery or working at unprotected heights. She is able to
perform simple, routine tasks with only superficial interaction with co-
workers and the public, with no extensive teamwork.

20
21 Tr. 24. The ALJ identified Plaintiff's past relevant work as fast food worker and
22 fast food manager and concluded that Plaintiff was not able to perform this past
23 relevant work. Tr. 29.

24 At step five, the ALJ determined that, considering Plaintiff's age, education,
25 work experience and residual functional capacity, and based on the testimony of
26 the vocational expert, there were other jobs that exist in significant numbers in the
27 national economy Plaintiff could perform, including the jobs of housekeeper,
28 production assembler, and hand packager. Tr. 30. The ALJ concluded Plaintiff

1 was not under a disability within the meaning of the Social Security Act at any
2 time from February 18, 2011, through the date of the ALJ's decision. *Id.*

3 **ISSUES**

4 The question presented is whether substantial evidence supports the ALJ's
5 decision denying benefits and, if so, whether that decision is based on proper legal
6 standards. Plaintiff contends the ALJ erred by (1) failing to properly weigh the
7 medical source opinions and (2) failing to properly address Plaintiff's symptom
8 statements.

9 **DISCUSSION**

10 **1. Medical Opinions**

11 Plaintiff argues the ALJ failed to properly consider and weigh the medical
12 opinions expressed by T.H. Palmatier, M.D., Aaron Burdge, Ph.D, Glenda
13 Abercrombie, ARNP, Richard Price, M.D., David W. Millett, M.D., and James
14 Haynes, M.D. ECF No. 14 at 5-16.

15 In weighing medical source opinions, the ALJ should distinguish between
16 three different types of physicians: (1) treating physicians, who actually treat the
17 claimant; (2) examining physicians, who examine but do not treat the claimant;
18 and, (3) nonexamining physicians who neither treat nor examine the claimant.
19 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more
20 weight to the opinion of a treating physician than to the opinion of an examining
21 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). The ALJ should give
22 more weight to the opinion of an examining physician than to the opinion of a
23 nonexamining physician. *Id.*

24 When a physician's opinion is not contradicted by another physician, the
25 ALJ may reject the opinion only for "clear and convincing" reasons. *Baxter v.*
26 *Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a physician's opinion is
27 contradicted by another physician, the ALJ is only required to provide "specific
28 and legitimate reasons" for rejecting the opinion of the first physician. *Murray v.*

1 *Heckler*, 722 F.2d 499, 502 (9th Cir. 1983).

2 **A. T.H. Palmatier, M.D.**

3 On February 26, 2010, Dr. Palmatier co-signed a treatment note rating
4 Plaintiff's employability as "[s]he is released to very modified sedentary work
5 status." Tr. 684. The ALJ did not discuss this statement in her opinion. Plaintiff
6 argues the ALJ's failure to address the statement was an error. ECF No. 14 at 6.

7 Social Security Ruling (S.S.R.) 96-8p states that the residual functional
8 capacity assessment "must always consider and address medical source opinions.
9 If the [residual functional capacity] assessment conflicts with an opinion from a
10 medical source, the adjudicator must explain why the opinion was not adopted."
11 However, the Ninth Circuit has also held that medical opinions predating the
12 alleged onset of disability are of "limited relevance." *Carmickle v. Comm'r, Soc.*
13 *Sec. Admin.*, 533 F.3d 1155, 1165 (9th Cir. 2008); *Warzecha v. Berryhill*, 692 Fed.
14 Appx. 859, 860 (9th Cir. 2017).

15 Considering the opinion predates Plaintiff's alleged onset date by a year, any
16 error that may have resulted from the ALJ's failure to discuss the opinion in her
17 decision is harmless as the statement is of limited relevance. *See Tommasetti v.*
18 *Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (An error is harmless when "it is clear
19 from the record that the . . . error was inconsequential to the ultimate nondisability
20 determination."). Additionally, the treatment note was co-signed by Nurse
21 Abercrombie, Tr. 684, who the ALJ provided legally sufficient reasons for
22 discounting her opinion. *See infra*.

23 **B. Aaron Burdge, Ph.D.**

24 On November 8, 2012, Dr. Burdge completed a Psychological/Psychiatric
25 Evaluation form for the Washington Department of Social and Health Services
26 (DSHS). Tr. 720-24. Dr. Burdge administered a Trails Making Test, a Hamilton
27 Rating Scale for Depression (HAM-D), a Hamilton Rating Scale for Anxiety
28 (HAM-A), and a Personality Assessment Inventory (PAI). Tr. 721. Additionally,

1 he completed a Mental Status Exam. Tr. 724. Following all this testing, Dr.
2 Burdge opined that Plaintiff had severe limitations in the abilities to complete a
3 normal work day and work week without interruptions from psychologically based
4 symptoms and maintain appropriate behavior at work. Tr. 723. Additionally, Dr.
5 Burdge found Plaintiff had a marked limitation in two areas of mental functioning
6 and a moderate limitation in six areas of mental functioning. Tr. 722-23.

7 The ALJ gave Dr. Burdge's opinion "minimal weight" because (1) the
8 mental status examination he administered was entirely normal except for memory
9 testing, (2) he provided no explanation for the boxes he checked, (3) Plaintiff did
10 not present to him, and (4) Plaintiff was not receiving mental health treatment at
11 the time of the evaluation. Tr. 28.

12 First, the ALJ found that Plaintiff's fairly normal mental status exam
13 administered by Dr. Burdge was inconsistent with the boxes he checked on the
14 form. Tr. 28. Internal inconsistencies between a provider's testing and opinion is
15 a clear and convincing reason to discount his opinion. *Bayliss v. Barnhart*, 427
16 F.3d 1211, 1216 (9th Cir. 2005). However, as Plaintiff asserts, the mental status
17 exam was one of several tests administered by Dr. Burdge. ECF No. 14 at 9-10.
18 The ALJ failed to address Plaintiff's severe and moderate results on the HAM-D
19 and the HAM-A. Tr. 721. Additionally, Plaintiff's PAI profile showed a
20 combination of hopelessness, agitation, confusion, and stress" and "may place the
21 respondent at increased risk for self-harm." *Id.* However, if the evidence is
22 susceptible to more than one rational interpretation, the court may not substitute its
23 judgment for that of the ALJ. *See Tackett*, 180 F.3d at 1097. Here, there are
24 normal results to support the ALJ's finding that there were inconsistencies between
25 the examination results and the opinion. *See* Tr. 721 (normal results on the Trails
26 Making Tests A and B); Tr. 724 (normal speech, Plaintiff was alert and attentive
27 and appeared to put forth adequate effort, affect was congruent, thought process
28 and content was normal, orientation was normal, perception was normal, fund of

1 knowledge was normal, concentration was normal, abstract thinking was normal,
2 and insight and judgement was normal).

3 Second, the ALJ found that Dr. Burdge failed to provide an explanation for
4 the boxes he checked. Tr. 28. An ALJ may reject check-the-box reports that do
5 not contain any explanation of the bases for their conclusions. *Crane v. Shalala*,
6 76 F.3d 251, 253 (9th Cir. 1996). The Ninth Circuit has found that check-the-box
7 forms that are “supported by numerous records” are “entitled to weight that an
8 otherwise unsupported and unexplained check-box form would not merit.”
9 *Garrison v. Colvin*, 759 F.3d 995, 1013 (9th Cir. 2014). Here, there are no
10 treatment notes from Dr. Burdge to support the opinion reflected on his form.
11 While Plaintiff asserts that the information contained on the form support the
12 limitations opined such as the abnormal test results discussed above, ECF No. 14 at
13 9-10, there are also enough normal findings to support the ALJ’s determination
14 that the limitations are unsupported. Tr. 721, 724. For this reason, the Court will
15 not disturb the ALJ’s treatment of Dr. Burdge’s opinion. *See Tackett*, 180 F.3d at
16 1097. Third, the ALJ found that “it does not appear that the claimant presented to
17 Dr. Burdge, so there are no clinical notes to support his limitations.” Tr. 28. It
18 unclear here what the ALJ is asserting. If the ALJ is asserting that Plaintiff was
19 not physically examined by Dr. Burdge, this inconsistent with Dr. Burdge’s
20 statements that Plaintiff “looked casual and disheveled in dress,” Tr. 724,
21 supporting the fact that Dr. Burdge actually observed Plaintiff. If the ALJ is
22 asserting that Dr. Burdge was not treating Plaintiff, this is a non-dispositive issue
23 as the ALJ is required to address all medical source opinions, 20 C.F.R. §§
24 404.1527(c); 416.927(c), and the ALJ must provide either clear and convincing or
25 specific and legitimate reasons for rejecting a provider’s opinion whether he is a
26 treating or an examining physician, *Lester*, 81 F.3d at 830. Therefore, this reason
27 is not legally sufficient to support discounting Dr. Burdge’s opinion.

28 Fourth, the ALJ found that Plaintiff was not receiving mental health

1 treatment at the time of the evaluation. Tr. 28. The Ninth Circuit has found that a
2 lack of treatment may support a finding that Plaintiff's reported symptoms are
3 unreliable, *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989), but a lack of
4 treatment is not an indication that a provider's opinion is unreliable. Therefore,
5 this not legally sufficient to support discounting Dr. Burdge's opinion.

6 While the ALJ may have erred in two of the four reasons provided for
7 discounting Dr. Burdge's opinion, he did provide two reasons that were supported
8 by substantial evidence and met the clear and convincing standard. Therefore, any
9 errors resulting from the ALJ's flawed reasons for the weight provided to Dr.
10 Burdge's opinion are harmless. *See Tommasetti*, 533 F.3d at 1038 (An error is
11 harmless when "it is clear from the record that the . . . error was inconsequential to
12 the ultimate nondisability determination.").

13 **C. Glenda Abercrombie, ARNP**

14 On July 9, 2010, Nurse Abercrombie completed a Functional Assessment for
15 DSHS in which she opined that Plaintiff could stand for two to four hours in an
16 eight hour work day, sit for four to six hours in an eight hour work day, lift fifteen
17 pounds occasionally, and lift five pounds frequently. She further opined that
18 Plaintiff had moderate limitations in the abilities to sit, stand, walk, lift, handle,
19 and carry and was restricted in her abilities to bend, climb, crouch, handle, kneel,
20 pull, push, reach, sit and stoop. Tr. 692. She then opined that Plaintiff's overall
21 work level was limited to sedentary. *Id.*

22 The ALJ did not find Nurse Abercrombie's opinion persuasive because (1)
23 she had referred Plaintiff to another provider to treat her shoulder complaints
24 several times and Plaintiff failed to follow through the referral so Nurse
25 Abercrombie completed the DSHS form herself, (2) her opinion was inconsistent
26 with the record, (3) her opinion was internally inconsistent, and (4) she relied on
27 Plaintiff self-reports.

28 Ms. Abercrombie is a nurse practitioner and, therefore, is not an acceptable

1 medical source. *See* 20 C.F.R. §§ 404.1513(a), 416.913(a) (2016).¹ Generally, the
2 ALJ should give more weight to the opinion of an acceptable medial source than to
3 the opinion of an “other source,” such as a nurse practitioner. 20 C.F.R. §§
4 404.1513, 416.913 (2016).² An ALJ is required, however, to consider evidence
5 from “other sources,” 20 C.F.R. §§ 404.1513(d), 416.913(d) (2016),³ “as to how an
6 impairment affects a claimant’s ability to work,” *Sprague*, 812 F.2d at 1232. An
7 ALJ must give “germane” reasons to discount evidence from “other sources.”
8 *Dodrill v. Shalala*, 12 F.3d 915 (9th Cir. 1993).

9 The reasons the ALJ provided for rejecting Nurse Abercrombie’s opinion
10 meet the germane standard. She did instruct Plaintiff seek treatment from another
11 provider for the shoulder complaints. Tr. 898, 899, 905. Only upon Plaintiff
12 reporting that she would lose her benefits unless the DSHS forms were completed
13 was Nurse Abercrombie willing to complete the forms. Tr. 905. Additionally, the
14 form appears internally inconsistent with Nurse Abercrombie indicating there were
15 no postural restrictions on page two of the form, Tr. 690, and then finding postural
16 restrictions present on page four of the form, Tr. 692. While Plaintiff argues that
17 these are not inconsistent determinations, ECF No. 14 at 13-14, the germane
18

19 ¹On March 27, 2017, these regulations were amended and the definitions of
20 an acceptable medical source now appear in 20 C.F.R. §§ 404.1502(a), 416.902(a)
21 and in claims filed with the agency after March 27, 2017, a nurse practitioner will
22 be considered an acceptable medical source. Since Plaintiff filed this claim in
23 2012, this new rule is not applicable.

24 ²On March 27, 2017, these regulations were amended and instructions on
25 how to weigh evidence for cases filed before March 27, 2017 now appear in 20
26 C.F.R. §§ 404.1527, 416.927.

27 ³On March 27, 2017, these regulations were amended and the instructions on
28 how to weigh “other sources” now appear at 20 C.F.R. §§ 404.1527(f), 416.927(f).

1 standard is the lesser of the three standards and under *Tackett*, if there is evidence
2 to support either outcome, the court may not substitute its judgment for that of the
3 ALJ. Therefore, the Court will not disturb the ALJ's treatment of Nurse
4 Abercrombie's opinion.

5 **D. Richard Price, M.D., David W. Millett, M.D., and James Haynes,**
6 **M.D.**

7 On February 19, 2010, Drs. Price, Millett, and Haynes evaluated Plaintiff for
8 the Washington Department of Labor and Industries. Tr. 642-55. They diagnosed
9 Plaintiff with a "[c]ervical strain and buttock contusion relative to the industrial
10 injury of January 7, 2009" and "[a]dministratively accepted dislocated thoracic
11 vertebra and lumbar sprain." Tr. 649. They stated that based on the examination
12 "there is no objective evidence of any abnormality relative to this industrial injury
13 to support the patient's ongoing complaints of pain and disability." Tr. 649. They
14 went on to recommend that her industrial claim be closed as there was no objective
15 basis to indicate a rating for the lumbar spine. Tr. 650. In the psychological
16 evaluation, Plaintiff denied any mental or emotional symptoms. Tr. 654.

17 In the her decision, the ALJ gave these doctors some weight, finding that
18 subsequent imaging revealed a shoulder impingement and some mild findings of
19 degenerative disk disease. Tr. 27. Plaintiff alleges that the opinion was internally
20 inconsistent, lacking in significant information, and only concerned her work
21 related injury. ECF No. 14 at 16-17. However, the ALJ considered the
22 outstanding evidence not available to Drs. Price, Millett, and Haynes and only
23 assigned some weight to the opinion. Tr. 27. Here, the ALJ provided an
24 explanation for the weight provided and did not error in her treatment of this
25 opinion.

26 **2. Plaintiff's Symptom Statements**

27 Plaintiff contests the ALJ's determination that her symptoms statements are
28 less than fully credible. ECF No. 14 at 16-20.

1 It is generally the province of the ALJ to make credibility determinations,
2 *Andrews*, 53 F.3d at 1039, but the ALJ's findings must be supported by specific
3 cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
4 affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's
5 testimony must be "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d
6 1273, 1281 (9th Cir. 1996); *Lester*, 81 F.3d at 834. "General findings are
7 insufficient: rather the ALJ must identify what testimony is not credible and what
8 evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834.

9 The ALJ found Plaintiff less than fully credible concerning the intensity,
10 persistence, and limiting effects of her symptoms. Tr. 25. The ALJ reasoned that
11 Plaintiff was less than fully credible because (1) her statements are not
12 corroborated by the objective medical evidence, (2) her treatment has been "scant,"
13 (3) there is evidence that Plaintiff over-stated symptoms, (4) there are
14 inconsistencies in the record, and (5) she has a sporadic work history. Tr. 25-27.

15 **A. Objective Medical Evidence**

16 The ALJ's first reason for finding Plaintiff less than credible, that Plaintiff's
17 symptoms are not supported by objective medical evidence, Tr. 25, is a specific,
18 clear, and convincing reason to undermine Plaintiff's credibility.

19 Although it cannot serve as the sole ground for rejecting a claimant's
20 credibility, objective medical evidence is a "relevant factor in determining the
21 severity of the claimant's pain and its disabling effects." *Rollins v. Massanari*, 261
22 F.3d 853, 857 (9th Cir. 2001). Here, the ALJ cited to multiple normal imaging
23 results and diagnoses of only minor conditions, such as sprains. Tr. 25. Plaintiff
24 argues that he ALJ records indicating limitation range of motion, hyperreflexia or
25 hypertonicity, slow gait, decreased sensation, tingling, or numbness, spasms, and
26 positive exam results indicating impairments. ECF No. 14 at 17. However, if the
27 evidence is susceptible to more than one rational interpretation, the court may not
28 substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at 1097. As both the

1 ALJ and Plaintiff pointed out, there is evidence to support both conclusions.
2 Therefore, the Court will not disturb the ALJ's determination.

3 **B. Treatment**

4 Next, the ALJ found that Plaintiff's "[t]reatment has also been scant." Tr.
5 25.

6 Noncompliance with medical care or unexplained or inadequately explained
7 reasons for failing to seek medical treatment cast doubt on a claimant's subjective
8 complaints. 20 C.F.R. §§ 404.1530, 416.930; *Fair v. Bowen*, 885 F.2d 597, 603
9 (9th Cir. 1989); *Macri v. Chater*, 93 F.3d 540, 544 (9th Cir. 1996) (finding the
10 ALJ's decision to reject the claimant's subjective pain testimony was supported by
11 the fact that the claimant was not taking pain medication). In coming to this
12 conclusion, the ALJ acknowledged that Plaintiff lacked private medical insurance,
13 but found that she was receiving state benefits and this would "likely gave her
14 access to care." Tr. 25 citing Tr. 675. Plaintiff alleges that the ALJ's
15 determination is not supported by substantial evidence as there were reasonable
16 explanations by Plaintiff for her missed appointments, including the fact that
17 Plaintiff's car was totaled. ECF No. 14 at 19.

18 The record shows that Plaintiff was scheduled to be seen at the
19 Rehabilitation Institute of Washington on May 4, 2010. Tr. 682. On April 23,
20 2010 Plaintiff was informed of the upcoming appointment and of the fact that her
21 expenses could be reimbursed. Tr. 681. On May 14, 2010 she reported that she
22 was involved in a car accident on Tuesday that rendered her car unreliable and
23 missed the appointment. Tr. 680. However, the Tuesday prior to May 14, 2010
24 was May 11, 2010, after the appointment scheduled for May 4, 2010. Regardless,
25 she reported she would get a ride to a new appointment on May 20, 2010. Tr. 680.
26 However, she missed the May 20, 210 appointment and failed to call the facility to
27 inform them that she could not attend. Tr. 678. As such, Plaintiff's argument
28 regarding the lack of transportation is unsupported. The Court will not disturb the

1 ALJ's determination.

2 The ALJ also found that Plaintiff failed to seek treatment for her mental
3 health symptoms. Tr. 26. The Ninth Circuit has held that "it is a questionable
4 practice to chastise one with a mental impairment for the exercise of poor
5 judgment in seeking rehabilitation." *Nguyen*, 100 F.3d at 1465. Therefore, the
6 Court will not hold the failure to seek mental health treatment against the Plaintiff.
7 However, as discussed above the ALJ's finding that Plaintiff's treatment for her
8 physical symptoms were "scant" is supported by the record.

9 **C. Over-stated Symptoms**

10 The ALJ found that the record showed Plaintiff had over-stated her
11 symptoms by showing evidence of pain behavior that a doctor found to be unusual,
12 she described her headaches as exceeding the pain scale yet there is no evidence
13 she went to the emergency room with complaints of headaches, and that the PAI
14 scores were outside the normal range. Tr. 26-27.

15 The ALJ first points to a report by Dr. Millett and Dr. Haynes finding
16 Plaintiff demonstrated "substantial evidence of pain behavior, in that her inability
17 to lift her right shoulder because of discomfort in the right paracervical area
18 certainly is an unusual finding. I think this is entirely related to pain behavior.
19 There is no evidence of any underlying neurological abnormality." Tr. 649. The
20 doctors then concluded that Plaintiff was "capable of employment." *Id.*

21 The ALJ also cites to a July of 2011 evaluation in which two of Plaintiff's
22 Waddell's signs were positive. Tr. 26 *citing* 717. The Ninth Circuit has
23 specifically held that Waddell signs are not affirmative evidence of malingering;
24 while the test establishes five signs of nonorganic low back pain, it does not
25 distinguish between malingering and psychological conditions. *Wick v. Barnhart*,
26 173 Fed. Appx. 597, 599 (9th Cir. 2006). However, the positive Waddell's signs
27 considered with Plaintiff's demonstration of pain behavior, as discussed above, and
28 the reports of pain exceeding the ten point scale and her PAI results supports the

1 ALJ's findings, as discussed below.

2 The ALJ then points to the record where Plaintiff alleges that her headache
3 pain exceeds the pain scale but failed to present at the emergency room with
4 headache complaints. Tr. 26 *citing* 635, 684, 686. On July 15, 2009 Plaintiff
5 presented to an office visit stating her pain was ten out of ten pain in her neck and
6 shoulders and a headache. Tr. 635. On January 15, 2010 Plaintiff reported at an
7 office visit that she had a migraine headache three times a month at the pain
8 intensity of eleven out of ten. Tr. 686. On February 26, 2010, Plaintiff
9 complained of pain in her cervical spine with pain radiating up the back of her
10 head as a twelve out of ten for the three prior days and a nine out of ten on the day
11 of the exam. Tr. 684.

12 Additionally, the ALJ cited to the PAI scores from November of 2012. Tr.
13 26-27 *citing* Tr.731. The section regarding the validity of the testing stated that
14 “[c]ertain of these indicators fall outside of the normal range, suggesting that the
15 respondent may not have answered in a completely forthright manner,” and that
16 Plaintiff “presents with certain patterns or combinations of features that are
17 unusual or atypical in clinical populations but relatively common among
18 individuals feigning mental disorder. It is suggested that the critical items, as well
19 as certain aspects of the clinical history, be reviewed to evaluate the possibility of
20 such distortion.” Tr. 731. This in combination with the other evidence considered
21 by the ALJ supports the ALJ's determination.

22 **4. Inconsistencies in the Record**

23 The ALJ cited to two inconsistencies in the record that supported her
24 determination that Plaintiff's symptoms statements were less than fully credible:
25 (1) that claimant testified she was homeless for the last four years but stated to
26 police that she was babysitting her grandchildren in her home and (2) that
27 Washington Department of Labor and Industries closed her claim despite her
28 “dramatic complaints.” Tr. 27. The ALJ may consider “ordinary techniques of

1 credibility evaluation, such as the claimant's reputation for lying, prior inconsistent
2 statements . . . and other testimony by the claimant that appears less than candid.”
3 *Smolen*, 80 F.3d at 1284.

4 At the hearing, Plaintiff testified that she had been homeless for four years.
5 Tr. 42. However, a Police Report dated May 30, 2013 describes a domestic
6 dispute stemming from Plaintiff watching children at a residence and the children's
7 parents failing to pay her resulting in the electricity to the home being shut off. Tr.
8 621-22. This would indicate that Plaintiff had a residence in which she could
9 watch children and was responsible for paying bills associated with the residence.
10 Plaintiff argues that this record is not inconsistent with her claims of homelessness
11 alleging that it does not prove Plaintiff owned or rented the residence. ECF No. 14
12 at 19. However, the fact that Plaintiff alleged that she was unable to pay the power
13 bill because she was not paid for the time she spent babysitting is inconsistent with
14 Plaintiff's claims of merely couch-surfing. Therefore, this inconsistency supports
15 the ALJ's determination.

16 The ALJ's determination that the closure of Plaintiff's claim with the
17 Washington Department of Labor and Industries as inconsistent with her degree of
18 alleged symptoms fails to meet the specific, clear and convincing standard.
19 Washington State Department of Labor and Industries has a different set of
20 requirements for benefits than the Social Security Administration. *See* WAC 269-
21 17-31001 through 296-17-35204. Considering this, without more specific
22 inconsistencies cited by the ALJ, the fact that the case file was closed is not
23 sufficient to support the ALJ's determination.

24 The ALJ also mentioned that Plaintiff attributed her physical symptoms to a
25 fall in 2009, however, the record also showed that she fell twice in 2008. Tr. 25
26 *citing* Tr. 806. The ALJ implies that this represents an inconsistency between the
27 record and Plaintiff's statements. However, it is unclear how Plaintiff blaming her
28 third fall as the cause of her symptoms and the fact that there were two previous

1 falls was inconsistent. As such, this alleged inconsistency found by the ALJ is not
2 sufficient to support her determination.

3 **5. Work History**

4 The ALJ found that Plaintiff's sporadic work history indicated that her
5 "barriers to work predated her alleged disabling conditions," that she provided
6 inconsistent reasons for leaving her previous employment, and that she had an
7 overpayment with the Washington State Employment Security Department serving
8 as "a disincentive to work unrelated to her impairments." Tr. 27.

9 The ALJ's determination that Plaintiff's sporadic work history showed that
10 barriers to work predated her alleged disabling conditions is a legally sufficient
11 reason to find her symptom statements unreliable. An ALJ finding that a claimant
12 had a limited work history and "ha[d] shown little propensity to work in her
13 lifetime" meets the specific, clear, and standard. *Thomas v. Barnhart*, 278 F.3d
14 947, 959 (9th Cir. 2002). Plaintiff's work history shows limited income from 1998
15 to 2002 and no income in 2003 and 2004. Tr. 212, 214-15. Therefore, the ALJ's
16 reason is both legally sufficient and supported by substantial evidence.

17 The ALJ's determination that Plaintiff's inconsistent statements regarding
18 why she left her last place of employment is a legally sufficient reason to
19 determine her symptom statements were less than fully credible. In determining a
20 claimant's credibility, the ALJ may consider "ordinary techniques of credibility
21 evaluation, such as the claimant's reputation for lying, prior inconsistent
22 statements . . . and other testimony by the claimant that appears less than candid."
23 *Smolen*, 80 F.3d at 1284. Upon application, Plaintiff stated that she left her last job
24 in January of 2010 because "I was experiencing depression and unexplained
25 physical pain. It became difficult for me to do the work." Tr. 234. In her
26 Disability Report for completed for DSHS Plaintiff stated that she stopped working
27 in December of 2009 because she "was not able to continue with job duties due to
28 my injury, was let go." Tr. 222. In her hearing testimony, Plaintiff stated that her

1 last job was at Burger King, Tr. 43, and that she left that job because “[t]here was a
2 \$5 discrepancy in the till. That’s what they used for firing me rather than my
3 medical because I had fallen and gotten hurt.” Tr. 54. The statements are
4 inconsistent, and the ALJ’s rationale was legally sufficient and supported by
5 substantial evidence.

6 The ALJ’s determination that Plaintiff’s overpayment with the Washington
7 State Employment Security Department served as a disincentive to work that was
8 unrelated to her impairments is not a legally sufficient reason to find her symptom
9 statements less than fully credible. The fact that a claimant’s wages will be
10 garnished if she works is insufficient to find her unreliable in her symptom
11 statements.

12 In conclusion, the Court will not disturb the ALJ’s determination. While
13 some of the reasons the ALJ provided for discounting Plaintiff’s symptoms
14 statements failed to meet the specific, clear and convincing standard, any error
15 resulting from the ALJ’s reliance on these reasons is harmless as she provided
16 additional reasons that met the standard. *See Carmickle*, 533 F.3d at 1163
17 (upholding an adverse credibility finding where the ALJ provided four reasons to
18 discredit the claimant, two of which were invalid); *Batson*, 359 F.3d at 1197
19 (affirming a credibility finding where one of several reasons was unsupported by
20 the record); *Tommasetti*, 533 F.3d at 1038 (an error is harmless when “it is clear
21 from the record that the . . . error was inconsequential to the ultimate nondisability
22 determination”).

23 CONCLUSION

24 Having reviewed the record and the ALJ’s findings, the Court finds the
25 ALJ’s decision is supported by substantial evidence and free of harmful legal error.
26 Accordingly, **IT IS ORDERED:**

27 1. Defendant’s Motion for Summary Judgment, **ECF No. 15**, is
28 **GRANTED.**

1 2. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is **DENIED**.

2 The District Court Executive is directed to file this Order and provide a copy
3 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Defendant**
4 and the file shall be **CLOSED**.

5 DATED February 9, 2018.

A handwritten signature in black ink, consisting of stylized, overlapping loops and strokes, representing the name John T. Rodgers.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE